No. 80-71

Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

RUTH D. HINSON,

*Petitioner,*

*vs.*

STATE OF NEW JERSEY,

*Respondent.*

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**On Petition for Writ of Certiorari to the Supreme Court of New Jersey**

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## BRIEF IN OPPOSITION

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## Questions Presented

1. Did the trial court's decision to bar as irrelevant evidence concerning the responsibilities of petitioner's accountants constitute a violation of the Sixth and Fourteenth Amendments to the United States Constitution? Is this issue cognizable by this Court?

2. Did the mere presence on the empanaled jury of an allegedly biased juror deprive petitioner of an "impartial jury" within the meaning of the Sixth and Fourteenth Amendments to the United States Constitution, notwithstanding the trial court's having interviewed the juror, having found no bias, and having removed the juror before deliberations began?[1]

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[1] Petitioner also raises (Petition at ii) the claim that she was denied the opportunity "to present evidence that she relied upon her accountants. . . ." Inasmuch as petitioner did in fact present such evidence, we do not consider this claim as one presented. See *infra* at 5.

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### Opinions Below

The order of the Supreme Court of New Jersey denying petitioner's petition for certification to the Superior Court of New Jersey, Appellate Division, —— N.J. ——, —— A.2d —— (1980), is appended to petitioner's Petition for Certiorari as Appendix A. The unreported opinion of the Superior Court of New Jersey, Appellate Division, is appended to the Petition as Appendix B. Petitioner's Appendix C is the unreported judgment of conviction of the Superior Court of New Jersey, Law Division.

## Jurisdiction

Petitioner asserts 28 U.S.C. sec. 1257(3) as the basis for this Court's jurisdiction over her case. We do not agree that this Court has jurisdiction to review petitioner's first two questions. See infra at 7-8.

## Constitutional Provisions, Statutes and Rules Involved

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. Sec. 1257(3):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

N.J.S.A. 30:4D-17(a) and (b), as of the date of this case:

> (a) It shall be unlawful for any person, firm, corporation, partnership, or other entity to willfully, by means of a false statement or representation, or by deliberate concealment of any material fact, or other fraudulent scheme or devise on behalf of himself or others, obtain or attempt to obtain medical assistance or other benefits or payments under this act to which he is not entitled, or in a greater amount than to which he is entitled, and, further, it shall be unlawful for any provider to willfully receive medical assistance payments to which he is not entitled, or in a greater amount than to which he is entitled, or to falsify any report or document required under this act.

(b) Any person, firm, corporation, partnership or other legal entity who violates the provisions of subsection (a) of this section shall be guilty of a misdemeanor and shall be liable to a penalty of not more than $10,000.00 for the first and each subsequent offense, or to imprisonment for not more than 3 years, or both.

NEW JERSEY EVIDENCE RULE 4:

The judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will either (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury.

## Statement of the Case

From 1971 through 1975, petitoner owned two nursing homes in Wayne, New Jersey. During this time, both nursing homes were Medicaid providers, which meant that the expenses incurred by qualifying patients were actually paid by the New Jersey Division of Medical Assistance and Health Services. To obtain these payments, the nursing homes were required annually to submit a cost study, from which the nursing homes' per diem reimbursement rate (cost per patient per day) is calculated. (Petitioner's appendix at 4-5)

In 1971, 1972, and 1973, petitioner signed the cost studies (thus certifying their accuracy) as both owner of the nursing homes and preparer of the studies. In 1974 and 1975, petitioner employed an accounting firm to prepare the cost studies, but petitioner again certified them accurate by signing the cost studies as owner. (Petitioner's appendix at 5).

In fact, the cost studies were wrong. The cost per patient per day was increased by a combination of two factors. On some cost studies, petitioner underrepresented the number of patient days. Moreover, on all cost studies petitioner included improper, personal expenses such as real estate taxes paid on non-business property. (Transcript 10/18/77, 168-171; Petition at 3.)

Petitioner was indicted for 19 violations of N.J.S.A. 30:4D-17. The essence of the charge was the allegation that petitioner willfully misrepresented her expenses and patient days to reach the result described in the previous paragraph. At trial, petitioner did not challenge the accuracy of the prosecution's proofs. Rather, she claimed that she entrusted the original books of record to her accountants, whom she expected to separate allowable expenses from prohibited expenses and submit a proper cost study. (Petitioner's appendix at 2-3, 5)

At trial, petitioner tried to demonstrate both her own reliance upon her accountants' expertise and the accountants' failure to act properly. Although petitioner testified in her own defense about her reliance, she was barred by the trial court from presenting evidence of the accountants' standard of care and professional obligations. The trial court ruled the proffered evidence not relevant to petitioner's guilt. (Petitioner's appendix at 5)

During the trial, defense counsel mentioned what he perceived to be another problem to the trial court. Specifically, he asserted that a juror was violating his oath by discussing the case with an employee of one of petitioner's nursing homes. The court invited defense counsel to learn whatever more he could, but declined to interrogate the jurors or even mention the issue. (Transcript 10/19/77, at 65-69)

The next morning, one of the jurors spoke with the trial judge. The juror explained that he knew a neighbor whose mother worked at one of petitioner's nursing homes. On the first day of trial, the juror had talked to this neighbor long enough to learn of her awareness of the case, after which he had terminated the conversation. (Transcript 10/20/77 at 3-4)

Unbeknown to the juror, defense counsel's investigator later telephoned the neighbor, who related to him the conversation. The neighbor then called the juror's wife, and at this juncture the juror was upset that his neighbors had somehow been involved in a challenge to the juror's own integrity. The juror assured the trial court, however, that the incident had not altered his impartiality. The court then asked the juror not to mention the incident to the other jurors. (Transcript 10/20/77 at 4-11, 22-23)

Despite defense counsel's objections, the trial court did not remove the juror at that time. One week later, however, immediately before summations, the court did remove the juror. (Transcript 10/20/77 at 13-36; Transcript 10/27/77 at 3-6). That same day, the jury convicted petitioner on all counts of the indictment. On November 29, 1977, petitioner was sentenced to pay fines totalling $6,000, and to serve three to five years in jail. (Petitioner's appendix at 9-10)

## Summary of Argument

Petitioner's first question presented for review is merely an issue of state, evidential law. Accordingly, it is not a question that this Court can recognize. In any event, the trial court's decision to bar evidence that petitioner's accountants did not exercise the proper standard of care was correct, because the state's proofs showed petitioner's

own guilt, independent of any action or inaction by her accountant.

The second question presented for review does not contain a meritorious claim. Petitioner never demonstrated an actual existence of an opinion in the juror's mind such as would raise a presumption of partiality. Moreover, the trial court thoroughly interrogated the juror, who denied that the incident affected his impartiality. In any event, the juror did not deliberate, so it is apparent that, whatever his feelings, they were not a factor.

## ARGUMENT

### A. The trial court's decision to bar irrelevant evidence is a question of State law, not now reviewable, and in any event was correct.

In this case, petitioner was accused of "willfully obtain-[ing Medicaid] benefits . . . to which [she was] not entitled," N.J.S.A. 30:4D-17(a), by including improper expenses in her cost studies. Petitioner's defense was that she did not include these expenses to defraud the State of New Jersey, but rather she relied upon her accountants to remove improper expenses. (See generally, petitioner's testimony, transcript 10/26/77). The trial court did not permit petitioner to introduce evidence concerning accountants' standard of care in general, and petitioner now claims constitutional error.

Pursuant to 28 U.S.C. sec. 1257(3), this Court can review any claim asserted under the Constitution of the United States. Questions of evidence law, however, are simply not claims so asserted.

In *Lisenba* v. *California,* 314 U.S. 219 (1941), this Court ruled that it "[does] not sit to review state court action

on questions of the propriety of the trial judge's action in the admission of evidence." 314 U.S. at 228. Moreover, this Court observed that the Constitution leaves the states free to adopt rules of relevance, so long as they are applied in accordance with state law. *Id.* at 227-228.

*New Jersey Evid.R.* 4 permits trial courts to exclude irrelevant evidence. In this case, petitioner's accountant's standard of care was not relevant to the question of petitioner's own intent when she entered personal expenses in her nursing homes' books of original account. The trial court's decision to exclude the proffered evidence was upheld by the Superior Court of New Jersey, Appellate Division (see petitioner's appendix at 6), and is thus beyond review by this court.

Lastly, we emphasize that the prosecution presented ample evidence tending to show that petitioner intentionally endeavored to disguise personal expenses as nuring home expenses. (See, *e.g.,* transcript 10/13/77 at 53-71). Whatever civil or criminal liabilities petitioner's accountants might have incurred were irrelevant to petitioner's own guilt, and the trial court properly refused to allow petitioner to distract the jury.

**B. The trial court ensured impartiality of the jury by interrogating the juror, and in any event by discharging him prior to deliberations.**

Petitioner's complaint that possible juror bias was insufficiently investigated is meritless.[2] The trial court exercised its discretion to interrogate the juror and found no bias. It properly permitted the juror to sit after discussing the matter with counsel. *See Arizona* v. *Washington,* 434 U.S. 497 (1978); *Mattox* v. *United States,* 146 U.S. 140 (1892); *United States* v. *Bohr,* 581 F.2d 1294, 1302 (8 Cir. 1978), *cert. den.* 439 U.S. 958 (1978).

In any event, the trial court did not permit the juror to deliberate. Thus, while it was within the court's discretion not to remove the juror in the circumstances of this case, *United States* v. *Bohr, supra,* any damage that could have resulted was obviated by the removal. *United States* v. *Boscia,* 573 F.2d 827, 830-832 (3 Cir. 1978), *cert.* den. 436 U.S. 911 (1978), 439 U.S. 854 (1978); *Jordan* v. *United States,* 408 F.2d 1305 (D.C. Cir. 1969).

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[2] Petitioner makes two statements at petition, 13, that we are constrained to challenge. Initially she states that "it became known" to defense counsel that a juror knew one of petitioner's employees. It did not. Rather, this claim was merely a defense theory, later abandoned. (Transcript 10/27/77 at 22-25, 32). Additionally, petitioner states that the juror expressed concern "that his withdrawal would adversely effect the petitioner's eventual conviction." This editorial imputation of bias cannot stand. It is clear from the record (Transcript 10/20/77 at 9) that the juror's concern was the continuation of the trial, and not its outcome.

## CONCLUSION

Petitioner's claims notwithstanding, her initial question presents no great public issue nor any serious constitutional problem. Rather, her first question is merely one of New Jersey's evidence rules, and this Court accordingly should decline to review the matter. While petitioner's second question may implicate the United States Constitution, it does so in no novel way. We therefore urge this Court to deny the instant petition.

Respectfully submitted,

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